IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1902

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,
Petitioner,

v.

CONSOLIDATED EXPRESS, INC. and TWIN EXPRESS, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, International Longshoremen's Association, AFL-CIO ("ILA") respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

Opinions Below

The majority and dissenting opinions of the Court of Appeals, rendered on April 16, 1979 and amended May 18, 1979, are not yet officially reported. They appear at

pages 2a-71a of the Joint Appendix hereto.* The underlying opinion of the United States District Court for the District of New Jersey rendered on December 19, 1977 appears at 72a-120a. A supplementary opinion of the District Court appears at 123a-125a. The District Court's order amending its opinion appears at 126a-127a.

Jurisdiction

The judgment of the Court of Appeals was entered on April 16, 1979. This Petition was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 USC § 1254(1).

Questions Presented

1. (a) Whether a prior NLRB determination may properly be invoked to collaterally estop defendant from contesting liability where the Board's determination involved a change of position which the District Court recognized was premised on an error of law, where additional relevant evidence has been unearthed through discovery which was unavilable in the administrative proceeding, where, by reason of the nature of the administrative determination, new issues have been generated which were not, and could not be, litigated before the agency, and where, if this Court upholds defendants' rights to trial of the same allegations to determine antitrust liability, no economy would result?

(b) Whether the standard for avoiding the imposition of offensive collateral estoppel on the ground that a fair opportunity to litigate was unavailable in a prior NLRB proceeding should be as rigorous as that which is required to re-open a judgment already entered?

* These and the following referenced opinions being voluminous are printed in a separate bound Joint Appendix to the Petitions of ILA and the New York Shipping Association, Inc. ("NYSA"), concurrently filed with the Court. It is submitted simultaneously herewith, and is referenced herein: "——a".

2. (a) Whether a defendant's due process rights to notice, presentation of its evidence and trial were denied by a circuit court decision ordering summary judgment dismissing an affirmative defense of estoppel *en pais* on the ground that defendant made no evidentiary showing in opposition to the motion, where (1) plaintiffs' motion was addressed only to the legal sufficiency of the defenses, (2) where plaintiff presented no affidavit or other evidentiary material in support of its motion, (3) where the district court found that the defense was legally sufficient, and (4) where the circuit court failed to provide any procedure, such as remand, in which defendant would have an opportunity to present its evidence in support of the defenses?

(b) Whether the above circumstances, even if they do not constitute denial of due process, nevertheless violate Rule 56 of the Federal Rules of Civil Procedure by granting summary judgment on a factual point without an evidentiary showing by the movant?

3. Whether LMRA § 303, which this Court has held Congress intended to be purely compensatory, is to be treated in practical effect no differently from punitive statutes for purposes of determining the applicable statute of limitations, the availability of affirmative defenses, and the imposition of offensive collateral estoppel?

4. Whether illegality may be raised as an affirmative defense to an action under LMRA § 303, (a) where the cause of action is purely compensatory and plaintiffs' lack of required licenses which would preclude them from lawfully collecting from their own customers what they seek as damages from defendant; and (b) where the secondary boycott violation has been held by the NLRB to be unlawful only when applied to a limited class of persons, into which these plaintiffs, by reason of the illegality of their businesses, rightfuly do not fall?

5. (a) Whether Congressional silence on the statute of limitations to be applied to a private action under LMRA § 303 for damages resulting from a secondary boycott should be interpreted as intending the action to have: (i) the same six-month limitation as the federal statute in which secondary boycotts are outlawed; (ii) the analogous statute of limitations of the state in which the private action is filed; or (iii) a different judge-made limitation?

(b) Whether the answer to the above question depends upon the particular kinds of acts alleged to have constituted the unfair labor practice?

(c) Whether a six-year limitation on such action frustrates federal policies encouraging collective bargaining agreements, the stability of existing relationships and speedy resolution of labor disputes?

6. Whether the rule applying state limitations to LMRA § 303, which has no express limitations, may be invoked without reference to state or federal choice of law principles?

Statutory Provisions Involved

The following relevant statutes appear at the indicated pages of the Joint Appendix:

Preliminary Statement

Simultaneously herewith a Petition For A Writ Of Certiorari is being filed by co-defendants with respect to the antitrust issues raised by this case. Petitioner ILA, a defendant in the antitrust counts, concurs and joins in co-defendant's petition for the reasons stated therein. The instant petition will confine itself to the issues arising under the LMRA count.

Statement of the Case

The multi-faceted judgment of which review is sought herein was rendered in an action for damages against Petitioner-Defendant ILA under § 303 of the Labor Management Relations Act, 29 USC § 187 (LMRA), and § 4 of the Clayton Act, 15 USC § 15. Defendant ILA is a labor organization representing longshoremen in the Atlantic and Gulf Coast Ports of the United States. NYSA is an incorporated association authorized to negotiate and enter into collective bargaining agreements on behalf of members who are ILA-employers engaged in the business of shipping cargo. This case arose out of collectively bargained work rules, known as the "Rules on Containers", designed to preserve longshore work at the docks by inhibiting pier-based employers from permitting work on their own equipment to be done by land-based labor of employers in close proximity to the port.

Whereas historically longshoremen had handled all maritime cargo piece by piece between the hold of the vessel and the tailgate of the truck, the increasing use of large receptacles, known as containers, which are affixed to and in aggregate form the hold of specially designed ships[1] and whose modularity permits them to be transported

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[1] This Court has recognized in another context that containers are the "functional equivalent of the hold of the ship" and that their unloading, even ashore, constitutes the unloading of the ship. *Northeast Marine Terminal Company, Inc.* v. *Caputo*, 432 US 249, 270-271 (1977).

inland intact by rail or truck, decimated work opportunities for longshoremen.[2]

To preserve that work from further erosion, the Rules, in pertinent part, were directed towards consolidators within 50 miles of a port whose employees load and unload from containers the cargo which had traditionally been handled by longshoremen at the docks. Plaintiffs, Consolidated Express, Inc. ("Consolidated") and Twin Express, Inc. ("Twin"), are such consolidators in the Port of New York area. Although they were aware of any possible violations of the LMRA as early as 1969, they deliberately elected not to challenge the Rules legally. Instead they permitted them to be enforced against competing consoidators, while they themselves surreptitiously evaded the Rules by fraud, forgery and commercial bribery. When it became apparent that the Rules were not accomplishing their intended purpose of preserving longshore work, the ILA and NYSA, relying on plaintiffs' evident acquiescence in the lawfulness of the Rules,[3] enacted more stringent enforcement provisions in 1973. No longer able to corner the market by evasion, plaintiffs embarked on litigation.

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[2] Statistics in the Port of New York over the period of containerization show that total work hours have declined from almost 43 million man-hours in 1958 to about 17.7 million man-hours at the present time. The number of registered longshoremen has decreased from 31,629 in 1958 to a present level of 10,919, of which only about 7,500 are hired on a daily basis. During the same period the amount of cargo handled by the port has almost doubled.

[3] Plaintiffs' deception was aided by the fact that earlier legal testing of the Rules had found them to be lawful. In 1969 the Newark Regional Director of the NLRB, sustained by the Board's General Counsel, dismissed a charge by Intercontinental Container Transport Corp. (ICTC), identical to the charge brought by plaintiffs herein, that they violated LMRA § 8(b)(4) and § 8(e) on the grounds they were work preservation. Also, their legality had been upheld under the antitrust laws for the same reason by the United States Court of Appeals for the Second Circuit. *Intercontinental Container Transport Corporation* v. *New York Shipping Association, Inc.*, 426 F.2d 884 (2d Cir. 1970).

Related Litigation

Prior to commencing the case at bar, plaintiffs herein brought charges with the National Labor Relations Board against the ILA and NYSA alleging violation of the "secondary boycott" and "hot cargo" provisions of the LMRA, § 8(b)(4) and § 8(e). In August 1973, the Board sought a preliminary injunction pursuant to § 10(l) of the LMRA. 29 USC § 160(l). The United States District Court for the District of New Jersey granted the injunction *Balicer* v. *International Longshoremen's Association, AFL-CIO,* 364 F.Supp. 205 (D.N.J. 1973), and the Third Circuit, *per curiam,* affirmed its limited finding of "reasonable cause", 491 F.2d 748 (3rd Cir. 1973).[4]

The two week notice of the 10(l) proceeding gave respondents therein no practical opportunity to utilize any disclosure procedures available in the district court. Moreover, the limited issue on a 10(l) injunction severely restricted any possible inquiry into the charging parties' activities. Since the rules of the NLRB afford no means of discovery, respondents in that proceeding, realizing that it would be impossible to obtain further evidence in the charging parties' possession, stipulated that the record before the district court should form the record before the Board.

On that record, Administrative Law Judge Arnold Ordman, himself a former General Counsel of the Board, recommended dismissal of the charges, holding that the Rules fell within the doctrine of work preservation enunci-

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[4] The narrow scope of the *Balicer* case is underscored by the subsequent observation of the Court of Appeals in *Sea-Land Service Inc.* v. *Director, Office of Workers Compensation Programs, United States Department of Labor,* 552 F.2d 985, 989, fn. 5 (3rd Cir. 1977), rendered after its affirmance and after a decision by the Second Circuit which went to the merits of the Rules, that it had no view on the validity of the Rules on Containers in the Third Circuit.

ated by this Court in *National Woodwork Manufacturers Association* v. *NLRB*, 386 US 612 (1967).

The Board reversed Judge Ordman. In purportedly applying the criteria of *National Woodwork*, it defined the "precise work in controversy" as that of the *consolidators'* employees and so found the Rules not to be work preservative and an unfair labor practice, *International Longshoremen's Association (Consolidated Express, Inc.)*, 221 NLRB No. 144 (1975).[5] On a proceeding for enforcement and review, a divided panel of the Court of Appeals for the Second Circuit upheld the Board. *International Longshoremen's Association, AFL-CIO* v. *NLRB*, 537 F.2d 706 (2d Cir. 1976), *cert. den.* 429 US 1041 (1977).[6] The division was purely on an issue of law. The majority agreed with the Board's definition of the work in controversy as that of the consolidators' employees. Judge Feinberg dissented, arguing that this was a clear misconception of the holding of this Court and that *National Woodwork* required the definition of the work in controversy to be the work sought to be preserved i.e., that of the complaining employees (here ILA longshoremen), the work preceding, not following, the introduction of the new technology.

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[5] Petitioner herein takes the position that the NLRB committed a fundamental error of law in misdefining the work in controversy. If one focuses on the innovator's work, no finding of work preservation is ever possible. Even *National Woodwork* itself would have been decided *contra*. The issue of the Board's error of law is not involved on this petition. However, the fact that the Board introduced a new definition, pursuant to which evidence concerning the charging parties' traditions became of paramount importance, is extremely relevant to the question of whether lack of discovery in the NLRB renders its decision unworthy of being given collateral effect.

[6] The Board proceeding and the subsequent enforcement by the Second Circuit will be referred to as *"Conex I"*.

Proceedings Below

Following the decision in *Conex I*, Consolidated and Twin commenced the present action in the United States District Court for the District of New Jersey. To the LMRA Section 303 Count, petitioner herein asserted the affirmative defenses of the statute of limitations; the illegality of the plaintiffs' entire business operations by reason of their failure to obtain a Part IV Freight Forwarders license as required by the Interstate Commerce Act, 49 USC § 1001 et seq.; and of estoppel *en pais* alleging that defendants had been induced to enact and apply the more stringent enforcement provisions of 1973 (which caused the only damages plaintiffs allege) in reliance on plaintiffs' competitively advantageous scheme of pretending to acquiesce in the Rules while unlawfully evading them in the period 1969-1973.

Evidence of plaintiffs' evasion of the Rules came to light in the initial stages of this case, the first meaningful discovery available to petitioners. It consists partially of Consolidated's own documents painstakingly culled over a period of 3 weeks from its voluminous files (over 100 drawers full) in Puerto Rico.[7] Although there had been intimations of such evidence in the earlier proceedings, lack of adequate discovery procedures had made it impossible to obtain. The evidence goes to the question of whether the work traditions of these consolidator-plaintiffs on which the NLRB relied in *Conex I* ever in fact legitimately existed.

On March 2, 1977 plaintiffs moved for partial summary judgment pursuant to Rule 56(c) FRCP, on (1) the liability of Defendant ILA on the LMRA § 303 count; (2) the liability of all defendants under the antitrust counts; and (3) "the *legal sufficiency* of the affirmative defenses

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[7] Testimony of witnesses in other tribunals, both before and *after* the decisions in *Conex I*, is also available.

raised" (emphasis supplied) by all defendants on all counts. The basis urged for summary judgment on liability was that defendants were collaterally estopped from denying violations of the LMRA by the prior adverse determination in *Conex I*. The moving affidavit was devoted exclusively to a narration of the proceedings before the NLRB and the Second Circuit in support of the invocation of collateral estoppel.

In deciding the motion, the district court held that the defendants were collaterally estopped from denying the LMRA violation (87a-90a) despite the existence of the new evidence and despite the Court's own recognition that under this Court's decision in *National Woodwork,*

> "the NLRB and the Second Circuit were wrong; the jobs of the ILA members *were* threatened by the boycotted product and the union activities were not used as an *Allen Bradley* sword to influence labor relations of a different employer." (106a-107a)

The district court held that, in the absence of a period of limitations in § 303 itself, it would apply New Jersey's six-year statute of limitations without regard to the state's borrowing rules (92a-95a).

However, it denied plaintiffs' motion for summary judgment by sustaining the affirmative defenses of illegality (90a-92a) and estoppel *en pais* (95a-97a). The court held that both defenses were good as a matter of law and that questions of fact existed requiring a fuller development of the record.

The issues on the branch of motion with respect to the affirmative defenses were noticed as purely legal. No affidavit or other evidence was introduced to deny the facts on which the ILA relied. Rather, for purposes of the motion, these facts were conceded as true, and in response defendant made no attempt to establish them by any evidentiary showing but relied on legal argument to show

that the defenses were, indeed, available if they could be proved.[8] The district court so held.

Recognizing that this case involved issues of "monumental" importance (136a), the district court granted certification under 28 USC § 1292(b). The Third Circuit accepted the interlocutory appeal, and eventually all of the issues raised on the motion below were briefed to and decided by the appellate court.

The Third Circuit affirmed the district court's application of collateral estoppel from the prior NLRB decision, suggesting that, if there was new evidence, defendant's appropriate course was to attempt to re-open *Conex I*.[9] (21a).

It reversed the district court's sustaining of the defense of illegality against the LMRA Count on the ground that this would neutralize the deterrent effect of § 303 (27a-28a) and would be "punishment disproportionate to the crime" of failing to obtain an ICC license (28a).

It upheld the dismissal of the defense of statute of limitations, holding that the New Jersey six-year limitation applied and enunciating the novel and unprecedented rule that neither state nor federal choice of law rules apply because the six-year statute was not "unduly short or discriminatory" and did not therefore thwart federal labor policy (22a-26a).

In reversing the district court's sustaining of the defense of estoppel *en pais* (29a-33a), the Third Circuit expressly

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[8] In arguing for the legal sufficiency for the defense, defendant did refer to some evidence. But this had been included in an affidavit opposing the imposition of collateral estoppel on the grounds of inadequate discovery before the Board. Defendant never attempted a full presentation of its evidence in support of the estoppel *en pais* defense.

[9] Petitions to reopen the prior proceeding on the basis of the newly discovered evidence had been presented to both the Second Circuit and the NLRB and had been denied.

declined to pass upon the issue of law of whether this defense is ever recognized in a § 303 action (31a). Instead it held that the record was deficient of facts or evidence to support the defense (29a-32a).

A petition for rehearing not *en banc* was filed, pointing out that the Third Circuit had decided the estoppel *en pais* issue on a basis from which the parties and the district court had prescinded and without defendant having had the opportunity to submit the evidence whose absence the appellate court found determinative. The petition also pointed out that the effect of the decision was to enact a statute of limitations for § 303 equal to the longest period permitted by any state in which a defendant can be served. The petition also sought reargument on the new issues raised by the Court's holding on the statute of limitations. Reargument was denied by order dated May 18, 1979.

By order dated May 24, 1979, the Court of Appeals granted a stay of its mandate pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure until final disposition by the Supreme Court.

Reasons for Granting the Writ

1. This Court should provide guidance to the federal judiciary on various aspects of the burgeoning area of collateral estoppel.

Certiorari should be granted because the case at bar is the next logical step in a series of decisions by this Court covering the area of collateral estoppel and requires answers from this Court to questions raised with respect to four of its prior decisions. The questions are:

What is an "adequate opportunity to litigate" in the prior forum? *United States* v. *Utah Construction and Mining Co.*, 384 US 394, 422 (1966).

What standard shall be used to determine a party's "inability to engage in full scale discovery"? *Parklane*

Hosiery Co. v. *Shore*, —— U.S. ——, 56 L.Ed. 2d 552 (1979).

What is the collateral estoppel effect where an administrative agency changes its position, thus imposing new liability on a party who has on good faith relied on its earlier ruling? *NLRB* v. *Bell Aerospace Company*, 416 US 267, 295 (1974).

Whether collateral estoppel precludes re-examination of a ruling of law by an administrative agency, recognized as erroneous by the subsequent court, which ruling fixes no rights or status in any party? *United States* v. *Moser*, 266 US 236 (1924).

A. Opportunity for "Full Discovery"

Only recently in *Parklane Hosiery Co.* v. *Shore, supra*, this Court recognized the danger inherent in the offensive use of collateral estoppel whereby a plaintiff, by its choice of the initial forum, may gain an unfair advantage in the subsequent litigation (58 L.Ed. 2d at 562). Inability "to engage in full scale discovery" was one of the precise circumstances mentioned which might warrant the denial of collateral estoppel (58 L.Ed. 2d at 562, fn. 15).

The decision below is unprecedented in its limitation on this caveat. It requires a litigant who seeks to avoid offensive collateral estoppel to make a showing of the kind of unfairness which would induce the original tribunal to reopen its already rendered judgment. While such a standard might be appropriate in a *res judicata* situation, it goes far beyond what the decisions of this and other Courts suggest with respect to collateral estoppel. The reopening of a rendered judgment is a rare and extraordinary remedy, granted only in the most compelling circumstances, and the burden imposed upon the party seeking it is one of the highest the law knows. *The Marine Insurance Co. of Alexandria* v. *Hodgson*, 11 US (7 Cranch), 332, 3 L.Ed. 362 (1813); *Hazel-Atlas Glass Company* v.

Hartford-Empire Company, 322 US 238 (1943); *Pickford* v. *Talbot,* 225 US 651 (1912). It goes far beyond showing "inability to engage in full-scale discovery" and requires a showing of something in the nature of perversion of the judicial process.

Since the lower Courts, in reliance upon *Utah* and now *Parklane,* are permitting offensive collateral estoppel with increasing frequency, a decision by this Court is required as to whether the Third Circuit's unusual standard is correct.

B. Adequate Opportunity to Litigate

In approving the application of the doctrine of collateral estoppel, this Court has consistently warned that the doctrine should be invoked only where the party against whom it is applied has had an "adequate opportunity to litigate" the issues in the prior proceeding *United States* v. *Utah Construction and Mining Company,* 384 US 394, 422 (1966); *Parklane Hosiery Co.* v. *Shore,* —— U.S. ——, 56 L.Ed. 2d 552, 562 (1979).

Until the NLRB defined the "work in controversy" to be that of plaintiffs' employees (which was *after* the fact finding process had been completed), the issues with respect to plaintiffs' own unlawful activities were of little relevance, even if evidence of them had been available. The focus in *Conex I* was on the *union's* activities.[10] In the present compensatory action, however, the issue is precisely whether plaintiffs fall within the limited class (consolidators with an existing work tradition) against whom enforcement of the Rules the Board found to be

[10] An unfair labor charge can be brought by any person, whether or not he has been affected or aggrieved by the alleged practice. *NLRB* v. *Local 42 Internat'l Ass'n of Heat and Frost Insulators and Asbestos Workers, supra; NLRB* v. *Chauffeurs, Teamsters and Helpers, Local No. 364 Int'l Bro. of Teamsters, C.W. & H. of America,* 274 F.2d 19, 24-25 (7th Cir. 1960).

an unfair labor practice,[11] i.e., whether they are a person "injured in his property or business."

Thus, petitioner herein is placed in a classic Catch 22 situation. Before the fact of the Board's decision, there was no reason to litigate the issue of plaintiffs' status. After the fact of the Board's decision, petitioner is collaterally estopped from litigating it.

Since this Court has sanctioned the imposition of collateral estoppel by administrative decisions, it should now give guidance to the lower court so as to avoid situations where the rights of litigants are crushed beneath the mechanistic and inexorable application of abstractions.

C. Procedural Due Process

The cumulative effect of the Third Circuit's blanket imposition of collateral estoppel while striking all affirmative defenses is to deny defendant its day in court. That alone calls for intervention by this Court. But additional aspects also deserve consideration.

The Board's new definition of the work in controversy represented a significant departure from the position it had taken previously in *National Woodwork.* Its finding that the Rules on Containers violate the LMRA reversed its earlier determination in the *ICTC* situation (*supra,* p. 6 fn. 3) that they are work preservation—a ruling on which defendants herein partially relied in strengthening and enforcing the Rules against plaintiffs. This Court has recognized that the NLRB is entitled to take a new position, but it has left open the question of what the effect of such a

[11] Recently, the Board's Region 5 Director dismissed a charge that these same Rules violated LMRA § 8(b)(4). The grounds were that "in the past employees of [the charging party] have never been, prior to the date of the incident, engaged in the task of partial container off-loading." The dismissal letter is reproduced as an appendix to this petition.

change would be in

> "a case in which new liability is sought to be imposed on individuals for past action, which were taken in good faith reliance on Board announcement." *NLRB* v. *Bell Aerospace Company,* 416 US 267, 295 (1974).

The instant case squarely presents that issue heretofore unresolved by this Court. Moreover, it does so in a context where the district court has recognized that the Board's new position involves an error of law and yet has still applied collateral estoppel in disregard of another decision of this Court. *United States* v. *Moser,* 266 US 236 (1924).

Since the complex collateral estoppel issues in this case bring to fruition potential dangers recognized in earlier decisions of this Court, particularly with regard to administrative decisions which lack some judicial safeguards, review is warranted to guide the lower Courts in similar and ever-recurring circumstances.

2. This Court should grant certiorari to afford defendant due process of law, which was denied by the Court of Appeals by its departure from the Federal Rules of Civil Procedure in granting summary judgment on a factual issue in the absence of evidentiary proof.

The Third Circuit's summary dismissal of the equitable defense represents at the least such a departure from the accepted and usual course of judicial proceedings as to warrant the exercise of this Court's supervisory power over the federal judiciary. It is also such a basic denial of due process as to require correction by this Court.

Defendant was never given notice, by either the motion or the moving affidavit, that the facts underlying its affirmative defenses were in contention. Although the motion to dismiss the defense of estoppel *en pais* was postured, argued, decided in the district court and briefed on appeal as an issue of *law,* the Third Circuit granted summary dismissal by deciding that defendant had not produced *facts* to establish the elements of the defense.

In so deciding the Court of Appeals denied defendant due process of law by effectively precluding it from presenting what evidence it might have on the factual issue. This had never been submitted to the district court since, on the motion to dismiss for legal insufficiency, plaintiffs conceded the facts. It had not been considered by the NLRB, both because of its unavailability and because, until the Board re-defined the work in controversy, it was not relevant. Thus, judgment is to be entered without any tribunal even considering defendant's evidence in support of the equitable defense. A more complete denial of due process is hard to imagine.

The ruling of the Third Circuit is in violation of the express language of Rule 56(e) and contravenes the holding of this Court that, where a movant has failed to submit evidentiary matter in support of his motion so as to establish the absence of issues of fact, summary judgment must be denied, notwithstanding that the adverse party does not offer any opposing evidentiary matter. *Adickes* v. *S.H. Kress & Co.,* 398 U.S. 144, 159-60 (1970).[12] It

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[12] That the decision below represents a significant departure from accepted judicial procedure is evidenced by the fact that the rule has been followed and enjoined on the district courts by every circuit, including the Third. *Ramsay* v. *Cooper,* 553 F.2d 237 (1st Cir. 1977); *United States* v. *Bosurgi,* 530 F.2d 1105 (2d Cir. 1976); *United States* v. *Pent-R-Books, Inc.,* 538 F.2d 519 (2d Cir. 1976), *cert. den.* 430 US 906 (1977); *Season-All Industries Inc.* v. *Turkiye Sise Ve Cam Fabrikalari, A.S.,* 425 F.2d 34 (3rd Cir. 1970); *Tomalewski* v. *State Farm Life Insurance Company,* 494 F.2d 882 (3rd Cir. 1974); *Phoenix Savings And Loan, Inc.* v. *The Aetna Casualty And Surety Company,* 381 F.2d 245 (4th Cir. 1967); *Boazman* v. *Economics Laboratory Inc.,* 537 F.2d 210 (5th Cir. 1976); *Board of Education* v. *Department of Health, Education and Welfare, Region 5,* 532 F.2d 1070 (6th Cir. 1976); *Staren* v. *American National Bank and Trust Company of Chicago,* 529 F.2d 1257 (7th Cir. 1976); *Hughes* v. *American Jawa Ltd.,* 529 F.2d 21 (8th Cir. 1976); *Hamilton* v. *Keystone Tankship Corporation,* 539 F.2d 684 (9th Cir. 1976); *Stevens* v. *Barnard,* 512 F.2d 876 (10th Cir. 1975); *Gray* v. *Greyhound Lines East,* 554 F.2d 169 (D.C. Cir. 1976).

likewise violates the well-established rule that on a motion for summary judgment the facts must be viewed in the light most favorable to the opposing party. *United States* v. *Diebold, Inc.*, 369 US 654, 655 (1962).

This Court is the arbiter and supervisor of the Federal Rules of Civil Procedure. See 28 USC § 2071; *Schlagenhauf* v. *Holder*, 379 US 104 (1964); *Los Angeles Brush Manufacturing Corporation* v. *James*, 272 US 701 (1927). In that role it should grant certiorari to require the Third Circuit to comply with Rule 56 and the decision in *Adickes, supra.* In the past, this Court has performed its supervisory function on a continuing basis. Having articulated the fundamental rule at least as long ago as 1943, *Sartor* v. *Arkansas National Gas Corporation*, 321 US 620 (1944), it has not hesitated to grant certiorari and, reiterating the same point of law, to correct its abuse when it has been violated. *Poller* v. *Columbia Broadcasting System, Inc.*, 368 US 464 (1962); *Adickes* v. *S.H. Kress & Company, supra* (1970). The instant case calls for a similar exercise of supervision.

3. Review is required to correct rulings of the Court of Appeals which misconstrue a federal statute with national implications.

In its holdings on the statute of limitations, the illegality defense and collateral estoppel, the Third Circuit has misconstrued the nature and purpose of LMRA § 303. This Court has held that § 303 is purely compensatory, to make whole persons injured in their property or business by an unfair labor practice as defined in other sections of the Act. *Local 20, Teamsters, Chauffeurs and Helpers Union* v. *Morton*, 370 US 252, 260 (1964); see also *Sheet Metal Workers International Association, Local 223* v. *Atlas Sheet Metal Co. of Jacksonville*, 384 F.2d 101 (5th Cir. 1967). See also, *International Longshoremen's and Warehousemen's Union* v. *Juneau Spruce Corporation*, 342 US 237, 244 (1952).

While ostensibly recognizing the purely compensatory nature of § 303, the Third Circuit treated it for all intents and purposes, as punitive. Indeed, the Court accorded § 303 no different treatment than that given the antitrust statute. Thus, it denied the availability of the illegality defense to both counts, but under a rationale applicable only to punitive and deterrent actions and not to compensatory actions.[13] By focusing on "deterrence" and upon "punishment disproportionate to the crime", the Third Circuit failed to deal with the real relevance of the illegality defense, i.e. that, because they are unlicensed, plaintiffs do not fall within the class of persons against whom the NLRB found applications of the Rules to be an unfair labor practice, and, hence, plaintiffs cannot be injured parties for purposes of § 303.

The Court of Appeals applied the New Jersey statute of limitations without borrowing, notwithstanding that the interest protected by § 303 is the integrity of plaintiffs' business which existed only in Puerto Rico and certainly had no connection with New Jersey. And it required collateral estoppel on a point of pure law in the NLRB decision in *Conex I* which fixed no rights in plaintiffs, in disregard of this Court's holding that collateral estoppel does not apply on a point of law which did not adjudge a party's rights or status in the prior action. *United States* v. *Moser*, 266 U.S. 236 (1924). As demonstrated above, the blanket imposition of collateral estoppel effectively prevented litigation of a decisive issue under § 303, i.e., plaintiffs' status

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[13] Unlike the antitrust law, which protects both private and public interests in a single action for compensatory and punitive damages, the LMRA distinguishes the two. Vindication of the public interest against unfair labor practices is provided for by an NLRB proceeding pursuant to § 10, 29 USC 160, where a charge may be brought, not only by an injured party, but by "any person" NLRB Rules and Regulations § 102.9; *NLRB* v. *Local No. 42, Internat'l Ass'n of Heat and Frost Insulators and Asbestos Wkrs.*, 469 F.2d 163, 165 (3rd Cir. 1972), *cert. den.* 412 US 940 (1973).

as injured parties, which had not been litigated before the NLRB.

Instruction by this Court is necessary as to the implications of the *Morton* decision for issues like those presented in this case and to prevent erosion of that decision and the Congressional policy it articulates by the practice of mere lip service.

4. A ruling by this Court is necessary to clarify whether a state statute of limitations may be applied to a federal cause of action without reference state or federal choice of law principles.

In its ruling that no conflict of laws principle applies, the Third Circuit struck new ground—ground on which a plaintiff may stand to invoke the longest statute of any state where a defendant may be served. Its decision failed to follow a prior holding of this Court, conflicts with the holdings of two sister circuits, and disregards a federal statute. At the same time, it addresses a question expressly left open by an earlier decision of this Court. All these factors call for review.

The Third Circuit rule is one of first impression. No case has been found, nor was any relied upon by the court, to support the avoidance of choice of law in applying a state statute of limitations to a federal cause of action. This Court has held, in *Cope* v. *Anderson,* 331 US 461 (1947), that choice of law principles *do* apply to state limitations when they are relied upon to measure the timeliness of a federal cause of action. The Third Circuit distinguished *Cope* on the grounds that "the explanation for this holding is obscure", that it dealt with 12 USC §§ 63, 64 (National Banking Act) rather than § 303, and that it applied to a statutory rather than judge-made choice of law rule (24a, 25a).

The Second and the Eighth Circuits have held that state borrowing rules do apply to state limitations which measure

the timeliness of federal actions. *Arneil* v. *Ramsey,* 550 F.2d 774, 779 (2d Cir. 1977) (*Securities Exchange Act of 1934,* 15 USC 78j (b)); *Burns* v. *Union Pacific Railroad,* 564 F.2d 20, 21-22 (8th Cir. 1977) (*Civil Rights Act,* 42 USC § 1981). Both conflict with the Third Circuit rule.

In both earlier cases the state choice of law rules were statutory rather than judge-made. However, under the *Rules of Decision Act,* 28 USC 1652, a federal court relying on a state law must interpret it in accordance with state decisions. The Third Circuit failed to do so.

In *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.)* v. *Hoosier Cardinal Corporation,* 383 U.S. 696 (1966), this Court expressly refrained from deciding "whether such a choice of law should be made in accord with the principle of *Klaxon Co.* v. *Stentor Mfg. Co.,* 313 US 487 . . . or by operation of a different federal conflict of laws rule" 383 US at 705, fn. 8. The instant case presents that issue squarely.

Since the Third Circuit's holding is novel and unprecedented and since it also can be applied to *any* federal statute which does not have its own period of limitations, the statute of limitations issues decided therein should be reviewed by this Court.

5. Whether the statute of limitations for LMRA § 303 is six months or some other period is a national question which should be decided by the Supreme Court.

The decision in this case, in practical effect, enacts a statute of limitations for § 303. It is respectfully urged that a decision of such national significance should be made by the Supreme Court in the light of its interpretation of the Congressional policy embodied in the LMRA.

This Court has never decided what statute of limitations should apply to § 303.[14] This section creates a federal right to compensation for injuries resulting from a secondary boycott proscribed by LMRA § 8(b)(4). The statute of limitations on bringing a secondary boycott charge before the NLRB is six-months LMRA § 10(b), 29 USC § 160(b). Congress did not enact a separate statute of limitations for filing an action for compensation.

This Court has suggested analytic guidelines with respect to actions brought under another unlimited section of the LMRA, § 301, *United Auto Workers* v. *Hoosier Cardinal Corp., supra;* see also *Local 174, Teamsters, Chauffeurs, Warehousemen and Helpers of America* v. *Lucas Flour Company,* 369 US 395 (1962), including consideration of the impact of the particular cause of action on the collective bargaining process, *United Auto Workers* v. *Hoosier Cardinal Corp.,* 383 US at 705 fn. 7, and its effect upon the rapid disposition of labor disputes, 383 US at 707. However, the Third Circuit has enunciated a rule so novel as not to have even been proposed by plaintiffs and has done so without consideration of these and other relevant factors which ought to be taken into account before any time period is established.

This case is one of first impression and review by this Court is necessary to establish a uniform statute of limitations for a law of national application.

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[14] Two circuits have addressed the issue of appropriate limitations for § 303 actions, *Falsetti* v. *Local Union No. 2026 United Mine Workers of America,* 355 F.2d 658 (3rd Cir. 1966); *International Union Of Operating Engineers* v. *Fishbach and Moore,* 350 F.2d 936 (9th Cir. 1965). (A case in another Circuit, *United Mine Workers of America* v. *Meadow Creek Coal Company,* 263 F.2d 52 (6th Cir. 1959), *cert. den.* 359 US 1013 (1959), is sometimes cited in this issue but the court had held that there was no federal violation. 263 F.2d at 59. It merely decided which of two state limitations applied to a state cause of action.)

6. The various questions raised by this case are such as will frequently recur in future litigation and thus warrant resolution by this Court at the present time.

The procedural issues herein have a pervasive influence throughout the federal judiciary and may arise in a multitude of contexts. Summary judgment granted without opportunity to be heard is an issue of constitutional due process and on that ground alone deserves consideration by this Court. It is also one fundamental to the procedure of federal courts. The increasing resort to administrative agencies as tribunals of first impression and the burgeoning use of collateral estoppel as an offensive weapon goes to the nexus of the administrative and judicial functions. The boundaries of this doctrine require precise articulation. In its supervisory capacity over the procedure of all federal courts, this Court should grant review.

The substantive issues with respect to the LMRA § 303, both as to its purpose and the appropriate statute of limitations, involve a federal statute in an area of vigorous activity. As the district court itself noted

> ". . . the law that will emerge from this case can have tremendous precedential effect upon the relationships between unions, employers, and third party businessmen throughout the country . . . they are going to be negotiating some future contracts around this country with an eye towards what we have said here."

Determinations of this Court are necessary not only for the conduct of future litigation but for the collective bargaining process itself.[15] For instance, disputes long settled

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[15] The problem of containerization and the Rules has already given rise to three major strikes: in 1968 (57 days in New York, 100 days in other ports, after expiration of a Taft-Hartley injunction), in 1971 (60 days), and in 1977 (41 days, against *containerized* employers only).

between an employer and his employees may be resurrected at the behest of a third party after the settlement has been the basis of two, three or more subsequent contracts if a plaintiff can serve the union in a state with a particularly long statute of limitations. The national implications of this merit consideration in light of both the need "to stabilize existing bargaining relationships", recognized by this Court as a policy of the LMRA. *Local Lodge No. 1424, International Association of Machinists, AFL-CIO* v. *NLRB*, 362 US 411, 419 (1960), and the policy of speedy resolution of labor disputes *UAW* v. *Hoosier Cardinal, supra.*

Given the facts that on a variety of questions the Third Circuit has enunciated novel and unprecedented rulings or has significantly departed from previous holdings and that numerous courts will face the same issues, guidance by this Court is required.

Conclusion

WHEREFORE, for the reasons above stated, Petitioner ILA respectfully submits that a Writ of Certiorari should be granted.

Respectfully submitted,

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ADDENDUM

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April 23, 1979

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Re: International Longshoremen's Association, et al.
(Terminal Corporation)
Cases 5-CC-920 & 5-CD-246

Gentlemen:

The above-captioned case, charging violations under Section 8 of the National Labor Relations Act, as amended, has been carefully considered.

It was concluded that the International Longshoremen's Association did not engage in conduct violative of either Section 8(b)(4)(i)(ii)(B) or 8(b)(4)(D) of the Act by its refusal to release to Sea Wheels, a trucking firm, two containers destined for Richmond, Virginia, when ILA was made aware of the fact that employees of Terminal would off-load portions of said containers. It was noted that Terminal's name did not appear on any of the accompanying documents as in the past and that in the past employees of Terminal have never been, prior to the date of the incident, engaged in the task of partial container off-loading. Ac-

cordingly, further proceedings are not warranted, and I am refusing to issue complaint in this matter.

Pursuant to the National Labor Relations Board Rules and Regulations, you may obtain a review of this action by filing an appeal with the General Counsel addressed to the Office of Appeals, National Labor Relations Board, Washington, D.C., 20570, and a copy with me. This appeal must contain a complete statement setting forth the facts and reasons upon which it is based. The appeal must be received by the General Counsel in Washington, D. C., by the close of business on May 7, 1979. Upon good cause shown, however, the General Counsel may grant special permission for a longer period within which to file. Any request for extension of time must be submitted to the Office of Appeals in Washington and a copy of any such request should be submitted to me.

If you file an appeal, please complete the notice forms I have enclosed with this letter and send one copy of the form to each of the other parties. Their names and addresses are listed below. The notice forms should be mailed at the same time you file the appeal, but mailing the notice forms does not relieve you of the necessity for filing the appeal itself with the General Counsel and a copy of the appeal with me within the time stated above.

Very truly yours,

WILLIAM C. HUMPHREY
William C. Humphrey
Regional Director

Enclosures
CERTIFIED MAIL
RETURN RECEIPT REQUESTED